

JOSEF D. COOPER (53015)
 TRACY R. KIRKHAM (69912)
 COOPER & KIRKHAM, P.C.
 357 Tehama Street, Second Floor
 San Francisco, CA 94103
 Telephone: (415) 788-3030
 Facsimile: (415) 882-7040
 E-mail: jdc@coopkirk.com
 Co-Lead Counsel for Indirect-Purchaser Plaintiffs

KAMALA D. HARRIS
 Attorney General of the State of California
 KATHLEEN FOOTE (65819)
 Senior Assistant Attorney General
 EMILIO E. VARANINI (163952)
 455 Golden Gate Avenue, Ste. 11000
 San Francisco, CA 94102
 Telephone: (415) 703-5908
 Facsimile: (415) 703-5480
 E-mail: Emilio.Varanini@doj.ca.gov
 Attorneys for the State of California On Behalf of All Attorneys General

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re DYNAMIC RANDOM ACCESS
 MEMORY (DRAM) ANTITRUST
 LITIGATION

Case No. M-02-1486-PJH
 MDL No. 1486

This Document Relates to:

ALL INDIRECT PURCHASER ACTIONS
 and

*State of California et al. v. Infineon
 Technologies AG, et al.*

*State of New York v. Micron Technology Inc., et
 al.*

**INDIRECT PURCHASER PLAINTIFFS
 AND ATTORNEYS GENERAL'S JOINT
 MOTION FOR FINAL APPROVAL OF
 PLANS OF DISTRIBUTION; RESPONSES
 TO OBJECTIONS TO PROPOSED
 DISTRIBUTION AND FOR FINAL
 ADOPTION OF RELEVANT FINDINGS
 IN SPECIAL MASTER'S REPORT AND
 RECOMMENDATIONS, PARTS I & II**

Hearing Date: June 25, 2014

Time: 9:00

Courtroom: 3

The Honorable Phyllis J. Hamilton

The Honorable Charles B. Renfrew (ret.)

Special Master

Case No. C 06-4333 PJH

Case No. C 06-6436 PJH

1	<i>State of California et al. v. Samsung Electronics</i>)	Case No. C 07-1347 PJH
	<i>Co., Ltd., et al.</i>)	
2	<i>State of California et al. v. Winbond Electronics</i>)	Case No. C 07-2589 PJH
	<i>Co.</i>)	Case No. C 12-5213 PJH
3	<i>Petro Computer Systems, Inc. v. Hitachi, Ltd.</i>)	Case No. C 12-5214 PJH
4	<i>Petro Computer Systems, Inc. v. Mitsubishi</i>)	Case No. C 12-5215 PJH
	<i>Electric Corporation, et. al.</i>)	Case No. C 12-5230 PJH
5	<i>Petro Computer Systems, Inc. v. Toshiba</i>)	Case No. C 12-5229 PJH
6	<i>Corporation, et. al.</i>)	Case No. C 12-5231 PJH
7	<i>State of California et</i>)	
	<i>al., v. Toshiba Corporation et al.,</i>)	
8	<i>State of California et</i>)	
	<i>al., v. Mitsubishi Electric Corporation, et. al.</i>)	
9	<i>State of California et</i>)	
10	<i>al., v. Hitachi, Ltd.</i>)	

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	THE STANDARDS FOR FINAL APPROVAL OF A PLAN OF DISTRIBUTION.....	3
III.	THE PROPOSED <i>PRO RATA</i> DISTRIBUTION IS A FAIR, REASONABLE AND ADEQUATE MEANS OF PROVIDING SETTLEMENT BENEFIT TO THE INDIRECT PURCHASER SETTLEMENT CLASS	8
IV.	THE PROPOSED <i>CY PRES</i> ASPECTS OF THE DISTRIBUTION ARE FAIR, REASONABLE AND ADEQUATE MEANS OF PROVIDING SETTLEMENT BENEFIT TO THE INDIRECT PURCHASER SETTLEMENT CLASS	12
	A. The \$50 Million Cap Contingency <i>Cy Pres</i> Distribution	12
	B. The Residual Contingency <i>Cy Pres</i> Distribution.....	16
V.	IT IS NOT NECESSARY TO DETERMINE THE IDENTITY OF THE CONTINGENT <i>CY PRES</i> RECIPIENTS IN ORDER TO GRANT FINAL APPROVAL TO THE PLAN OF DISTRIBUTION OR THE SETTLEMENTS	18
VI.	CONCLUSION.....	23

TABLE OF AUTHORITIES

Case Authority:

<i>Aboud v. Detroit Bd. Of Ed.</i> 431 U.S. 209 (1977).....	23
<i>Arthur v. Microsoft Corp.</i> 267 Neb. 586; 676 N.W.2d 29 (Neb. 2004).....	10
<i>Ciardi v. F. Hoffmann-La Roche, Ltd.</i> 436 Mass. 53; 762 N.E.2d 303 (Mass. 2002).....	10
<i>Davenport v. Washington Ed. Assn.</i> 551 U.S. 177 (2007).....	23
<i>Dennis v. Kellogg Co.</i> 697 F.3d 858 (2012).....	18, 19
<i>Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)</i> 213 F.3d 454 (9 th Cir. 2000)	3
<i>Hammon v. Barry</i> 752 F. Supp. 1087 (D.D.C. 1990).....	3
<i>Illinois Brick Co. v. Illinois</i> 431 U.S. 720 (1977).....	8, 9, 10
<i>In re Agent Orange Prod. Liab. Litig.</i> 818 F.2d 179 (2d Cir. 1987).....	4
<i>In re Airline Ticket Commission Antitrust Litig.</i> 953 F. Supp. 280 (D. Minn. 1997).....	11
<i>In re Baby Prods. Antitrust Litig.</i> 708 F.3d 468 (5 th Cir. 2011)	16, 22
<i>In re Bankamerica Cop. Se. Litig.</i> 210 F.R.D. 694 (E.D. Mo. 2002)	9
<i>In re Brand Name Prescription Drugs Antitrust Litig.</i> No. 94 C 897, 1999 U.S. Dist. LEXIS 12936, 1999 WL 639173 (N.D. Ill. Aug. 17, 1999).....	11

1	<i>In re Cendant Corp. Sec. Litig.</i>	
2	109 F. Supp. 2d 235 (D.N.J. 2000), <i>aff'd</i> , 264 F.3d 201 (3d Cir.),	
3	<i>cert. denied</i> , 535 U.S. 929 (2002)	3
4	<i>In re Compact Disc Minimum Advertised Price Antitrust Litig.</i>	
5	216 F.R.D. 197 (D. Me. 2003)	11, 17
6	<i>In re Computron Software, Inc. Sec. Litig.</i>	
7	6 F.Supp.2d 313 (D.N.J. 1998)	3
8	<i>In re Corrugated Container Antitrust Litig.</i>	
9	556 F. Supp. 1117 (S.D. Tex. 1982), <i>aff'd</i> , 687 F.3d 52 (5 th Cir. 1982)	11
10	<i>In re Exxon Valdez</i>	
11	No. A89-0095 (HRH), 1996 U.S. Dist. LEXIS 8173 (D. Alaska, June 11, 1996)	5
12	<i>In re Global Crossing Sec. & ERISA Litig.</i>	
13	225 F.R.D. 436 (S.D.N.Y. 2004)	4
14	<i>In re Heritage Bond Litig.</i>	
15	NDL No 1475, 2005 U.S. Dist. LEXIS 13555 (C.D. Cal. 2005)	4, 9
16	<i>In re Lucent Tech, Inc. Sec. Litig.</i>	
17	307 F. Supp. 2d 633 (D.N.J. 2004)	3
18	<i>In re Marsh ERISA Litig.</i>	
19	265 F.R.D. 128 (S.D.N.Y. 2010)	4
20	<i>In re Mexico Money Transfer Litigation</i>	
21	164 F. Supp. 2d 1002 (N.D. Ill. 2000)	
22	<i>aff'd</i> , 264 F.3d 743 (7 th Cir. 2001)	18
23	<i>In re Microsoft I-V Cases</i>	
24	135 Cal.App.4 th 706 (2006)	18
25	<i>In re NCO Fin. Sys.</i>	
26	2002 U.S. Dist. LEXIS 17602 (E.D. Pa. 2002)	17
27	<i>In re Oracle Se. Litig.</i>	
28	1994 U.S. Dist. LEXIS 21593 (N.D. Cal 1994)	9
	<i>In re Packaged Ice Antitrust Litig.</i>	
	2011 U.S. Dist. LEXIS 15-0427, (E.D. Mich. Dec. 13, 2011)	11
	<i>In re Paine Webber Ltd. Partnerships Litig.</i>	
	171 F.R.D. 104 (S.D.N.Y. 1977)	3, 4

1	<i>In re Relafen Antitrust Litig.</i>	
2	231 F.R.D. 52 (D. Mass. 2005).....	9, 10
3	<i>In re Remron Direct Purchaser Antitrust Litig.</i>	
4	No. 03-0085 FSH, 2005 WL 3008808 (D.N.J. Nov. 9, 2005).....	3
5	<i>In re Remron End-Payor Antitrust Litig.</i>	
6	No. 02-2007 FSH, 2005 WL 2230314 (D.N.J. Sept. 13, 2005).....	3
7	<i>In re Toys-R-Us Antitrust Litig.</i>	
8	191 F.R.D. 347 (S.D.N.Y. 2000)	18
9	<i>In re Vitamins Cases</i>	
10	107 Cal.App.4 th 820 (2003)	18
11	<i>In re Warfarin Sodium Antitrust Litigation</i>	
12	212 F.R.D. 231 (E.D. Del. 2002), <i>aff'd</i> , 391 F.3d 516 (3d Cir. 2004)	3
13	<i>Knox v. Service Employees Intern. Union, Local 1000</i>	
14	132 S. Ct. 2277 (2012).....	23
15	<i>Kowalski v. Tesmer</i>	
16	543 U.S. 125 (2004).....	23
17	<i>Klier v. Elf Atochem North America, Inc.</i>	
18	658 F.3d 468 (5 th Cir. 2011)	16
19	<i>Law v. NCAA</i>	
20	108 F. Supp. 2d 1193 (D. Kan. 2000).....	4
21	<i>Maley v. [Del Global Techs. Corp.]</i>	
22	186 F. Supp. 2d 358 (S.D.N.Y. 2002).....	4
23	<i>Nachshin v. AOL, LLC</i>	
24	663 F.3d 1034 (9 th Cir. 2011)	3, 15, 16
25	<i>Rodriguez v. West Publ. Corp.</i>	
26	2007 U.S. Dist. LEXIS 74767 (C.D. Cal. Sept. 10, 2007)	
27	<i>aff'd in part and rev on other grounds by Rodriguez v. West Publ'g Corp.</i>	
28	563 F.3d 948 (9 th Cir. 2009)	17, 20, 23
	<i>State of California v. Infineon Techs. AG</i>	
	531 F. Supp. 2d 1124 (N.D. Cal. 2007)	10

1	<i>Sullivan v. DB Invs., Inc.</i>	
2	667 F.3d 273 (3d Cir. 2011), (<i>en banc</i>), <i>cert denied sub nom.</i>	
3	<i>Murray v. Sullivan</i> 132 S. Ct. 1876 (Apr. 2, 2012).....	4, 10, 14, 16
4	<i>Walsh v. Great Atl. & Fac. Tea Co., Inc.</i>	
5	726 F.2d 956 (3d Cir. 1983).....	4
6	<i>Warth v. Seldin</i>	
7	422 U.S. 490 (1997).....	23
8	<i>Woodley v. Maynard</i>	
9	430 U.S. 705 (1977).....	19, 22
10	<u>Statutory Authority:</u>	
11	Federal Rule of Civil Procedure, Rule 53(f).....	2, 5
12	Massachusetts Consumer Protection Statute, §9	10

I. INTRODUCTION

On January 17, 2014, this Court granted the joint motion of the Indirect Purchaser Plaintiffs and the Attorneys General to conditionally adopt the findings of fact, conclusions of law and recommendations of the Special Master regarding the plans of distribution of the settlement proceeds and the protocols for processing claims to the settlement funds. “Order Granting Preliminary Approval of Joint Settlements, Conditionally Certifying Settlement Classes, Adopting Special Master’s Report and Recommendations, Parts I & II, Disseminating Notice To the Settlement Classes, and Scheduling Fairness Hearing,” filed January 17, 2014, Dkt. No. 2174 (“Preliminary Approval Order”). The Preliminary Approval Order also scheduled a hearing for 9:00 AM on June 25, 2014, at which time the Court would entertain any objections raised by class members to, *inter alia*, the plans of distribution and the claims processing protocols.

The Indirect Purchaser Plaintiffs and the Attorneys General hereby move this Court for an order finally adopting the relevant findings of the Special Master and directing that the recommended plans of distribution and claims processing protocols be implemented upon the finality of the settlements. This motion is based on the facts and legal analysis and conclusions set forth in the relevant sections of the “Report And Recommendations Of Special Master, Part I: Settlement Class Certifications And Plans Of Allocation And Distribution Of The Settlement Proceeds To The Settlement Classes,” filed January 8, 2013, Dkt. No. 2132, (hereinafter cited as “Report, Part I, at ____”), the Appendix thereto, Dkt. Nos. 2133 - 2144, the “Report And Recommendations Of Special Master, Part II: Notice Programs, Claims Procedures and Processing,” filed June 24, 2013, Dkt. No. 2146, (hereinafter cited as “Report, Part II, at ____”), and the Appendix thereto, Dkt. No. 2147, this memorandum, “Indirect Purchaser Plaintiffs’ and Attorneys General’s Joint Motion for Final Approval and Responses to Objections to Final Approval of Settlements, Certification of Settlement Classes and for Final Adoption of the Special Master’s Report and Recommendations, Part I,” filed June 4, 2014, Dkt. No. 2214, (hereinafter cited as “Memorandum re Settlement Approval at ____”), the motion for preliminary approval of

1 the plans of distribution, Dkt. No. 2265, and all of the records in this litigation.

2
3 This memorandum will address the objections that are directed to aspects of the proposed
4 plan of distribution for the Indirect Purchaser Settlement Class. Six objections were filed to the
5 proposed plan on behalf of a total of thirteen members of the Indirect Purchaser Settlement Class.
6 No objection was lodged to the claims processing protocols for the Indirect Purchaser Settlement
7 Class¹ or to the plans of distribution recommended by the Special Master for the Government
8 Purchaser Settlement Classes. Therefore, the Court's conditional adoption of the Report and
9 Recommendation, Parts I and II, as to the plans of distribution to the Government Classes and the
10 claims protocols for the Indirect Purchaser Settlement Class should be deemed finally adopted. *See*
11 Fed. R. Civ. P. 53(f).

12 All of the objections to the Indirect Purchaser Settlement Class's plan of distribution raise
13 issues that were previously addressed by the parties before the Special Master and were thoroughly
14 covered by the Special Master's findings of fact and conclusions of law. None of the objections
15 presents a new matter for consideration by the Court. Although there are six objections, there are
16 only two aspects of the distribution plan at issue. All of the objections argue that the plan of
17 distribution is unfair because: (1) it will pay claims on a *pro rata* basis without regard to the state in
18 which a claimant resides; and/or (2) it contains contingency *cy pres* provisions.

19 As noted in the Memorandum re Settlement Approval, fixing a plan for distributing the
20 settlement proceeds to class members is distinct from the decision to grant final approval to a
21 settlement and dismiss the claims against the defendants. The principle issue for settlement
22 approval—a comparison of the settlement consideration against the risks of proceeding to trial—is
23 replaced in fixing a plan of distribution, with the goal of achieving a disbursement methodology
24 that fairly balances the interests and concerns of class members within a framework that is
25

26 ¹ Claims processing protocols refers to the form of the claim forms, the nature of the information solicited
27 thereby, as well as the methodology for converting the DRAM content of various DRAM-containing devices
28 into a standard unit in order to effectuate the *pro rata* distribution.

understandable, transparent, practical and cost-effective.

II. THE STANDARDS FOR FINAL APPROVAL OF A PLAN OF DISTRIBUTION

As covered in the Report, Part I, at ¶ 263, approval of plans of allocation and distribution of a settlement fund in a class action is governed by the same standards applicable to approval of the settlement as a whole—namely, allocation and distribution plans must be fair, adequate and reasonable. *In re Lucent Tech., Inc. Sec. Litig.*, 307 F.Supp.2d 633, 649 (D.N.J. 2004) (quoting *In re Computron Software, Inc. Sec. Litig.*, 6 F.Supp.2d 313, 321 (D.N.J. 1998)); *see also In re Remron End-Payor Antitrust Litig.*, No. 02-2007 FSH, 2005 WL 2230314, at *25 (D.N.J. Sept. 13, 2005). However, district courts enjoy broad supervisory powers over the administration of class action settlements to allocate the proceeds among the claiming class members equitably. *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454 (9th Cir. 2000); *see also Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011).; *In re Remron Direct Purchaser Antitrust Litig.*, No. 03-0085 FSH, 2005 WL 3008808, at *11 (D.N.J. Nov. 9, 2005) (quoting *Hammon v. Barry*, 752 F. Supp. 1087, 1095 (D.D.C. 1990).

Moreover, by any objective measure, “a Plan of Allocation need not be, and cannot be, perfect.” *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 272 (D.N.J. 2000), *aff’d*, 264 F.3d 201 (3d Cir.), *cert. denied*, 535 U.S. 929 (2002). Neither need, nor can, a plan of distribution be optimal from the perspective of each and every individual potential claimant. In many cases, if not in most cases, perfection to everyone’s satisfaction is unattainable. *In re Warfarin Sodium Antitrust Litigation*, 212 F.R.D. 231, 258 (E.D. Del. 2002), *aff’d*, 391 F.3d 516, 534 (3d Cir. 2004). As the Special Master concluded, “In designing a plan of distribution for a settlement such as this involving a large number of different products and millions of class members, a delicate balance must be achieved between precision and administrative feasibility.” Report, Part I, at ¶ 266, citing *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104,135 (S.D.N.Y. 1977) (“Efficiency, ease of administration and conservation of public and private resources are highly relevant in the reasonableness of a settlement.”).

1 In light of these standards, “[a] district court’s ‘principal obligation’ in approving a plan of
 2 allocation ‘is simply to ensure that the fund distribution is fair and reasonable as to all participants
 3 in the fund.’ *Walsh v. Great Atl. & Pac. Tea Co., Inc.*, 726 F.2d 956, 964 (3d Cir. 1983).” *Sullivan*
 4 *v. DB Invs., Inc.*, 667 F.3d 273, 326 (3d Cir. 2011) (*en banc*), *cert. denied sub nom. Murray v.*
 5 *Sullivan*, 132 S. Ct. 1876 (Apr. 2, 2012) (hereinafter, “*Sullivan*”).

6 This Court can give great weight to the fact that this plan of distribution was arrived at by
 7 negotiation and agreement of counsel familiar with the litigation under the supervision of the
 8 Special Master. Many courts have held that the experience of the counsel who formulated the
 9 distribution plan was a significant factor in determining that the plan of distribution represents a
 10 fair, reasonable and adequate allocation and distribution of the settlement proceeds. As noted by
 11 the district court in *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145-46 (S.D.N.Y. 2010):

12 A district court has broad supervisory powers with respect to allocating a class
 13 action settlement and wide latitude in determining what to consider in approving a
 14 settlement allocation. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 181 (2d
 15 Cir. 1987). “When formulated by competent and experienced class counsel, an
 16 allocation plan need have only a ‘reasonable, rational basis.’” *In re Global Crossing*
 17 *Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004). In determining whether
 a plan of allocation is fair, courts give substantial weight to the opinions of
 experienced counsel. *See In re PaineWebber Ltd. P’ships. Litig.*, 171 F.R.D. 104,
 133 (S.D.N.Y. 1997).

18 In *Law v. NCAA*, 108 F. Supp. 2d 1193, 1196 (D. Kan. 2000), the district court found that the case
 19 law indicates that “[t]he adequacy of an allocation plan ordinarily ‘turns on whether counsel has
 20 properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair
 21 and reasonable in light of that information.’ (Citation omitted).” Other cases relying on the
 22 competence of the counsel proposing the plan of distribution as grounds for a finding of fairness
 23 and adequacy include: *In re Heritage Bond Litig.*, MDL No. 1475, 2005 U.S. Dist. LEXIS 13555,
 24 at *38-39 (C. D. Cal. 2005) (“An allocation formula need only have a reasonable, rational basis,
 25 particularly if recommended by experienced and competent counsel.”); *Maley v. Del Global Techs.*
 26 *Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002) (“The proposed Plan of Allocation, which was
 27 devised by experienced plaintiffs’ counsel who are familiar with the relative strengths and

1 weaknesses of the potential claims of Class members, satisfies the same standards of fairness,
2 reasonableness, and adequacy that apply to the overall settlement"); *In re Exxon Valdez*, No. A89-
3 0095 (HRH), 1996 U.S. Dist. LEXIS 8173, at *5 (D. Alaska, June 11, 1996) ("In light of the
4 experience and views of counsel and the zeal with which they represent their clients, the court is
5 satisfied that the Plan of Allocation is in the best interests of plaintiffs.").

6 In particular, the proposed plan of distribution before this Court was negotiated under the
7 auspices of the Special Master between Indirect Purchaser Plaintiffs' Co-Lead Counsel and
8 Leadership Group, the Attorneys' General's Co-Lead Counsel, Resellers' Allocation Counsel and
9 Counsel for Indirect Purchaser Settlement Class member, Celestica. The involvement of these
10 counsel is an important factor here, as the Special Master found. Report, Part I, at ¶ 213. The
11 major groups of alleged victims in this case were resellers, large-purchasing end users and
12 household consumers. Though household consumers were by far the largest numerical group, on
13 an individual basis, they each purchased far fewer computers, other DRAM-containing products, or
14 DRAM module upgrades during the class period than did resellers or large business end users.

15 One of the principal issues in the negotiations was the amount of the overcharge that the
16 reseller class members had passed-on to the end-user class members.² Report, Part I at ¶ 232. The
17 litigation class proposed for certification by Indirect Purchaser Plaintiffs' Co-Lead Counsel and
18 Leadership Group had been limited to end-users, and during the course of the litigation, these
19 counsel had advanced the position that 100% of the overcharges allegedly imposed by defendants
20 were passed on to end-users by resellers and others down the chain of distribution. *Id.* at ¶ 236.
21 Although there would have been nothing wrong with the Special Master appointing one of those
22 counsel to represent the resellers' interests to look at the pass-on issue from the perspective of
23 resellers, the parties felt that it was preferable to find counsel for the resellers who had not
24 previously been involved with the litigation.

25
26 ² No objection has been interposed to the treatment of resellers and end-users vis-à-vis one another in the
27 proposed Plan of Distribution. Thus, this aspect of the distribution plan as recommended by the Special
28 Master should be deemed adopted. *See* Fed. R. Civ. P. 53(f).

Accordingly, the Special Master first solicited representation for resellers directly from their ranks. The only reseller willing to invest its counsel's efforts was Celestica, a specialty reseller that bought DRAM chips and modules and assembled computer products for sale to large OEMs. *Id.* at ¶ 207. Because it was felt that the general reseller group needed broader representation than could be offered by Celestica's counsel, the Special Master appointed Berman DeValerio as Resellers' Allocation Counsel. *Id.* at ¶ 209. For the purposes of negotiating the pass-on issue, the interests of all end-users, whether large purchasers and small, corporate or corporeal, were aligned and were represented by Indirect Purchaser Plaintiffs' Leadership Group and the Attorneys' General.

Under the auspices of the Special Master, and armed with extensive economic data and expert analysis regarding market structure and the pricing decisions affecting the passing on of damages down the chain of distribution, these groups of alleged victims hammered out a single *pro rata* distribution plan. Report, Part I, at ¶¶ 270-271. This plan recognized that quantifying pass-on damages was difficult and subject to endless second-guessing, and that claimants who purchased large quantities of DRAM should receive more than claimants who purchased small amounts.³ This aligned the interests of all large quantity purchasers, whether they be resellers like Best Buy or end-users like Bank of America. In addition to crafting a plan that was consistent with the economic data, the representatives of these different groups had to balance non-economic concerns, including that: (a) household consumers in the aggregate have the single largest number of claims and could swamp the entire distribution should they file in unprecedentedly large numbers; (b) however, conversely, this is the group least likely to actually file for a refund, so a significant swath of the Indirect Purchaser Class could potentially receive no direct compensation should only a small number of household consumer claims be filed; and (c) due to the small

³ See, "Declaration of Josef D. Cooper in Support of Indirect Purchaser Plaintiffs' and Attorneys General's Joint Motion for Final Approval of Plans of Distribution and for Final Adoption of Relevant Findings in Special Master's Report & Recommendations, Parts I & II," dated June 6, 2014 (hereinafter referred to as "Cooper Decl. at ¶__") at ¶ 4, and the "Declaration of Emilio E. Varanini in Support of Indirect Purchaser Plaintiffs and Attorneys General's Joint Motion for Final Approval of Plans of Distribution and for Final Adoption of Relevant Findings in Special Master's Report & Recommendations, Parts I & II," dated June 6, 2014 (hereinafter referred to as "Varanini Decl. at ¶__") at ¶ 4. These Declarations are being filed concurrently with this memorandum.

1 number of modules and DRAM-containing products purchased by individual household consumers,
2 a pure *pro rata* distribution might result in many of these individuals receiving checks so small that
3 it would not be worth their time either to file claims in the first instance, or to cash the checks that
4 they would receive. Cooper Decl. at ¶ 8; Varanini Decl. at ¶ 8. To resolve those issues, counsel
5 agreed, based on the economic data, to establish maximum and minimum dollar amounts of the
6 settlement funds that would be dedicated for the benefit of small claimants, generally consumer
7 households, either through a direct cash payments and/or through a *cy pres* distribution. Cooper
8 Decl. at ¶ 9; Varanini Dec. at ¶ 9. In addition, counsel agreed that if the raw *pro rata* share of any
9 claimant was less than \$10.00, that claimant's share would be raised to \$10.00. *See* Report, Part I,
10 at ¶ 276. Counsel for all of the various constituencies agreed that this plan was fair and
11 reasonable.⁴ *Ibid.* As the Special Master correctly found, "the selection of a distribution method or
12 plan does not require that all other possible means of distributing the settlement funds be rejected as
13 inadequate or unreasonable, only that the method that is selected by the parties and the court be
14 fundamentally fair and practicable." Report, Part I, at ¶ 267.

15
16
17
18
19 ⁴ Objectors Norman Palmer and Estate of Fern Cook have interposed a general objection to the plan of
20 distribution, couched as an objection to "the settlement," based on an erroneous reading of the Special
21 Master's description of these negotiations. First, Palmer and Cook assert that "[l]arge corporations within
22 the reseller subgroup were . . . represented by their own counsel during the settlement negotiations."
23 "Objections to Proposed Settlement and Notice of Intent to Appear," filed May 5, 2014 (Dkt. No. 2201) at 3,
24 (hereinafter cited as "Palmer Objection at ____"). This statement is wrong on two counts. First, all of the
25 settlements were negotiated by Indirect Purchaser Plaintiffs' Leadership Group and the Attorneys' General's
26 Co-Lead Counsel. Neither Resellers' Allocation Counsel nor counsel for Celestica played any role in those
27 negotiations. Second, as to the plan of distribution negotiations, all resellers from large corporations to
28 individual mom and pop proprietorships were represented by the Allocation Counsel appointed by the
Special Master. Only Celestica participated through its own counsel. Then, Palmer and Cook claim that
"attorneys general from various states provided separate representation for many Class Members." *Ibid.*
This statement is vaguely correct and rather innocuous until Palmer and Cook couple it with their ultimate
assertion that "individual purchasers did not have separate counsel representing their interest" and therefore
the "settlement is presumptively unfair." *Ibid.* As described above, at all times, the interests of *all*
"individual purchasers," by which plaintiffs assume that Palmer and Cook mean household consumers, were
fully represented and vigorously advanced by counsel for the Indirect Purchaser Plaintiffs and the Attorneys
General.

III. THE PROPOSED *PRO RATA* DISTRIBUTION IS A FAIR, REASONABLE AND ADEQUATE MEANS OF PROVIDING SETTLEMENT BENEFIT TO THE INDIRECT PURCHASER SETTLEMENT CLASS

Two of the objectors to the certification of the Indirect Purchaser Settlement Class advance the exact same *Illinois Brick* argument again in opposition to the plan of distribution—that the Settlement Class contains persons and entities who will be compensated under the plan for their purchases of DRAM and DRAM-containing products despite the fact that, according to objectors, they have no colorable claims because they reside in states whose courts construe their antitrust laws in accordance with the United States Supreme Court’s decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (“*Illinois Brick*”).⁵

Neither of these objections presents even a reasonably compelling argument for the fairness of a weighted or tiered settlement distribution, let alone demonstrates that a failure to weight class members’ settlement recoveries renders the recommended plan fundamentally unfair and inadequate. As discussed in detail in the Memorandum re Settlement Approval, this objection is predicated on a misunderstanding of the claims at issue here and a misreading of *Illinois Brick*. For, example, objector Marlow repeatedly makes the bald assertion that the recommended plan will pay people “whose states do not even permit them to file suit” without suggesting an alternative. Marlow Objection at 10.⁶ That assertion is not correct. Every member of the Indirect Purchaser Settlement Class is settling multiple colorable claims, including identical claims for ancillary monetary relief under the Sherman Act and damages under the Cartwright Act. *See*, Memorandum re Settlement Approval at 5-16.

///

⁵ See, “Objection to Class Certification, Plan of Allocation and Attorney’s Fees,” dated May 5, 2014, Dkt. No. 2199, at 6-7 (hereafter cited as “Cochran Objection at ____”); “Notice Of Objection, Intention To Appear And Request To Be Heard,” dated May 5, 2014, Dkt. No. 2204, at 2, 10-11 (hereinafter cited as “Marlow Objection at ____”).

⁶ It is not clear from Marlow’s objection whether he is advocating that this alleged inequity could be cured by an unequal distribution of the settlement proceeds that favors residents of *Illinois Brick* repealer states over those of non-repealer states, or whether he believes that the only fair distribution would give nothing at all to non-repealer state residents.

1 Objector Cochran makes the same *Illinois Brick* based objection to the plan, but, unlike
2 Marlow, urges an alternative distribution that she contends would be fair. After citing a number of
3 cases in which there were weighted distributions, Cochran concludes that this Court should adopt
4 an “allocation of the Settlement Fund in this case . . . [that] follow[s] a grid similar to the one set
5 forth in *[In re] Relafen [Antitrust Litig., 231 F.R.D. 52,65 (D. Mass. 2005)]*, which tracked the
6 differences among the various state’s antitrust and consumer protection laws.” Cochran Objection
7 at 6-7. However, none of the weighting protocols in the cases on which she relies accomplish her
8 stated purpose of having a system that pays more to *Illinois Brick* repealer state residents. Three of
9 the four cases cited by Cochran—*In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555 (C.D.
10 Cal. 2005), *In re Bankamerica Corp. Sec. Litig.*, 210 F.R.D. 694 (E.D. Mo. 2002) and *In re Oracle*
11 *Sec. Litig.*, 1994 U.S. Dist. LEXIS 21593 (N.D. Cal. 1994)— are not even antitrust cases. They are
12 securities cases that appear to have implemented weighted distribution plans tied to evidence that
13 securities purchasers during certain time periods suffered greater injury than others. Whatever the
14 basis in those cases was for determining that some claims were “stronger” than others, it was not
15 residence in an *Illinois Brick* repealer or non-repealer state.

16 The case chiefly relied upon by Cochran is *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 65
17 (D. Mass. 2005). While *Relafen* is an antitrust case in which a weighted refund plan was adopted
18 for a settlement class, it is not authority for dividing the Indirect Purchaser Settlement Class here
19 into the repealer vs. non-repealer resident groups for which Cochran appears to be arguing. First,
20 *Relafen* did not arise in a comparable situation to this litigation, where all class members have a
21 unitary claim under a single law, i.e., under the California Cartwright Act or under the Sherman Act
22 for ancillary restitutionary relief flowing from an injunction. Moreover, it appears that the basis for
23 the tiered recovery adopted by the District Court in *Relafen* pertains far more to the underlying
24 facts concerning pharmaceutical purchases than simply to the *Illinois Brick* repealer issue. For
25 example, the weighting given to the claims of residents of repealer states in *Relafen*, range from a
26 high of 90% for residents of Hawaii alone, to a low of 9.2% for residents of Alabama, Kansas,
27

Mississippi, New Hampshire, Oregon and Utah. This weighting would be patently unfair here, when the residents of Hawaii, Mississippi, Oregon, Utah, and (for the Samsung/Winbond settlements) New Hampshire are represented in this case not only by Class Counsel but also *parens patriae* by the Attorneys General of those States. In contrast, in *Relafen*, residents of Massachusetts, Nebraska, and West Virginia, all of whom have been considered non-repealer states at various times,⁷ had their claims weighted at 82.5%. The critical factor in the *Relafen* weighting scheme, and the reason that Hawaii claimants were paid at a higher rate than any others, was each state's pharmaceutical consumer protection statutes, not its antitrust laws. Accordingly, there is nothing about the *Relafen* weighting scheme that recommends its adoption here.

The first appellate court to consider the question of whether the *Illinois Brick* repealer vs. non-repealer state dichotomy requires a weighted or tiered recovery plan as a matter of law or fundamental fairness was the Third Circuit sitting *en banc* in *Sullivan, supra*, which was handed down after *Relafen*. That Court concluded that neither law nor fundamental fairness mandates a weighted recovery based on perceived strength of state law claims. *Sullivan, supra*, 667 F.3d 273, 327-328. No federal court has disagreed before or since. First, the *Sullivan* Court observed that “only by engaging in the type of fact-intensive merits and choice-of-law analyses that we have rejected could a district court attempt to assay the ‘varying strengths and weaknesses’ of asserted state claims.” *Id.* at 328. The Third Circuit also noted that in *Sullivan*, like here, “each putative

⁷ These States provide a good example of another reason why a weighted distribution can be problematical. It is not always easy to classify a state as repealer or non-repealer, and such classification may over time be fluid. For example, before settling here, the defendants raised the argument that Illinois Brick barred claims under West Virginia's antitrust laws. *State of California v. Infineon Techs. AG*, 531 F. Supp. 2d 1124, 1154 (N.D. Cal. 2007). This Court found that West Virginia was a repealer state by virtue of an Attorney General promulgated rule. *Id.*, at 1154. While Massachusetts antitrust law is construed to apply *Illinois Brick* to damage claims, in *Ciardi v. F. Hoffmann-La Roche, Ltd.*, 436 Mass. 53, 762 N.E.2d 303, 309, 321 (Mass. 2002), the Massachusetts state court allowed individuals who were indirect purchasers of vitamin products to sue for anticompetitive conduct under § 9 of the Massachusetts consumer protection statute. The same is true of Nebraska. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29, 37-38 (Neb. 2004). All of these states and their residents are in this litigation, and consumers there are represented both by Class Counsel and their Attorneys General acting in *parens patriae*. The difficulty of classifying states by the applicability of *Illinois Brick* as a bar to indirect purchaser damages was another factor that weighed in favor of adopting a *pro rata*, single pot plan of distribution here.

1 class member suffered the same alleged injury as a result of [defendants'] anticompetitive conduct,
 2 irrespective of the vagaries of applicable state laws. Recognizing this, the plan of allocation here
 3 'adjust[s] diamond purchases to a common measure,' allowing an 'apples to apples' comparison 'of
 4 the relative amount of damages suffered by various claimants within the classes and subclasses and
 5 permits distribution pro rata based on the relative amounts of damages suffered.'" *Ibid.*

6
 7 Many courts have approved distribution plans, such as the one recommended here, that strive
 8 to the maximum extent practicable to treat all class members alike. For example, in *In re Brand*
 9 *Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1999 U.S. Dist. LEXIS 12936 (N.D. Ill.
 10 Aug. 17, 1999), the court approved a *pro rata* distribution in a case involving class member
 11 pharmacies of all sizes, ranging from small, independent pharmacies to large chain pharmacies,
 12 including CVS, Walgreens and Walmart. *See also, e.g., In re Packaged Ice Antitrust Litig.*, 2011
 13 U.S. Dist. LEXIS 150427, (E.D. Mich. Dec. 13, 2011); *In re Airline Ticket Commission Antitrust*
 14 *Litig.*, 953 F. Supp. 280, 284-85 (D. Minn. 1997) (proposed *pro rata* distribution plan was "cost-
 15 effective, simple and fundamentally fair"); *In re Corrugated Container Antitrust Litig.*, 556 F.
 16 Supp. 1117, 1129 (S.D. Tex. 1982) (approval of class action settlement that provided for *pro rata*
 17 distribution based upon valid claims of allowable purchases), *aff'd*, 687 F.2d 52 (5th Cir.1982).

18 As the record of the proceedings before the Special Master demonstrates, the issue of
 19 whether to adopt a tiered plan of distribution was thoroughly considered before it was rejected.
 20 Report, Part I at ¶¶ 108 -113, 202 – 205, 255 – 261, 274, and Exhibits 19 – 23, 42 in the Appendix
 21 thereto. The basic feature of the recommended plan here is that all class members are essentially
 22 treated equally, and the settlement proceeds divided *pro rata* based upon the quantity of DRAM
 23 purchased by each class member.⁸ This plan was arrived at through compromise and after a full
 24 consideration of "whether any weighted distribution plan would unduly complicate and prolong the

25 ⁸ Small claimants may receive more than their strict *pro rata* share of the settlement pot because of the
 26 minimum refund amount of \$10 and the ability to raise their claims up to single damages depending on
 27 claims experience. For example, in *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216
 28 F.R.D. 197, 211, 213 (D. Me. 2003), the district court approved a settlement that paid all consumer
 claimants approximately \$14.00.

1 settlement approval process and invite appeals in this litigation that is already more than nine years
 2 old,” and exploration of the “concern that any weighted distribution plan may ultimately turn on
 3 subjective views as to the relative merits and relative importance of aspects of the totality of a class
 4 member’s released claims, and spawn an ancillary round of litigation among class member
 5 objectors about who should get how much and on what basis.” Report, Part I at ¶ 259. No objector
 6 has impugned the record or the findings of the Special Master as being insufficiently thorough, or
 7 the objective as being an inappropriate one for allocation plans.

8 The *pro rata* aspects of the plan of distribution for the Indirect Purchaser Settlement Class
 9 thus represent a fair, reasonable and adequate method of distributing the settlement proceeds, and
 10 the Special Master’s findings of fact and conclusions of law recommending the plan should be
 11 finally adopted by this Court.
 12

13 **IV. THE PROPOSED *CY PRES* ASPECTS OF THE DISTRIBUTION ARE FAIR,**
 14 **REASONABLE AND ADEQUATE MEANS OF PROVIDING SETTLEMENT**
 15 **BENEFIT TO SMALL CLAIMANTS IN THE INDIRECT PURCHASER**
SETTLEMENT CLASS

16 There are two contingencies in the negotiated plan of distribution that, if they should occur,
 17 would trigger the need for this Court to approve a *cy pres* distribution of a portion of the settlement
 18 proceeds. Since neither of these contingencies has yet occurred and, in the considered opinion of
 19 both counsel and the Special Master, neither may ever occur, this Court is not now being asked to
 20 approve any particular *cy pres* remedy. All that the Court is being asked to approve at this point is
 21 the contingent framework under which a *cy pres* distribution might conceivably be necessary.

22 Several objectors complain that the mere existence of the *cy pres* contingency renders the
 23 plan of distribution unfair. One objector also asserts that the contingent *cy pres* recipients must be
 24 designated before the plan of distribution can be approved.

25 **A. The \$50 Million Cap Contingency *Cy Pres* Distribution**
 26

27 One contingency that would trigger the need to formulate a *cy pres* distribution is if there are
 28

1 more than five million claims received from “small claimants.” A small claimant is defined in the
2 plan as any class member whose claim in an initial *pro rata* computation would yield a recovery of
3 less than \$10.00. Contrary to the assertions of objectors, this cap was not selected as part of a
4 nefarious secret plan to divert the Indirect Purchaser Settlement Class’s money into the hands of
5 third parties. As the Special Master noted, a *cy pres* distribution will only occur if there is a
6 number of consumer claims that no one realistically expects to reach. Report, Part I, at ¶ 279.
7 Although the claims period is not scheduled to close until August 1, 2014, based on the number of
8 claims received as of June 2, 2014, the chances of this *cy pres* provision being triggered is so
9 remote, the objections to it are for all practical purposes moot. Cooper Decl. at ¶ 13; Varanini
10 Decl. at ¶ 13.

11
12 If any number of such claims under five million is received, the plan calls for each of these
13 claimants to be paid a minimum \$10.00 recovery. In other words, if a claimant’s “raw,” *pro rata*
14 recovery would be \$4.72, that claimant’s share of the fund will be raised to \$10.00. This raise was
15 negotiated in recognition of the belief, based on counsels’ prior experience, that having a set
16 minimum recovery would encourage the filing of household consumer claims. Encouraging the
17 filing of such claims was important because these class members are numerically the largest set of
18 victims and in the aggregate, paid a significant portion of the allegedly illegal overcharge. Cooper
19 Decl. ¶ 8; Varanini Decl. ¶ 8. Based on the economic data, the parties negotiating the plan of
20 distribution agreed to a \$50 million cap on the portion of the settlement proceeds that would be
21 used to compensate small claimants, and determined that if there were so many small claimants that
22 raising each to \$10.00 would exceed the allotted \$50 million, an alternative *cy pres* distribution of
23 \$40 million would be made to those claims. This was based on a belief that a *cy pres* distribution
24 crafted properly would convey a benefit on small claimants equal to or greater than sending them
25 checks that, depending upon the actual number of claims received, could be far less than \$10.00
26 and might not even cover the cost to prepare and disburse them. In exchange for setting the small
27 claims recovery at \$10, in the unlikely event that the *cy pres* provision would be triggered, it was

1 agreed that all claimants with recoveries larger than \$10.00 would get the benefit of an additional
2 \$10 million (the difference between the \$40 million *cy pres* and the \$50 million that potentially
3 could have gone to small claimants) that would remain in the pot and be paid out *pro rata* to larger
4 claimants. Cooper Decl. ¶ 12; Varanini Decl. ¶ 12.

5
6 Most court approved plans of distribution have some floor for approved claims and do not
7 mail checks to class members whose *pro rata* share is below a specified minimum. Report, Part I,
8 at ¶¶ 277-278, 281. Generally, in those cases, the monies that would otherwise go to those small
9 claimants are redistributed to larger claimants. Thus, in most cases there is no direct benefit going
10 to the small claimants, nor is there any attempt to distribute money in a way that conveys an
11 indirect benefit on this group. Relying on these authorities, including the Third Circuit's *en banc*
12 decision in *Sullivan, supra*, 667 F.3d at 328, which rejected an attack on a plan which paid nothing
13 to claimants whose *pro rata* shares were below a \$10.00 threshold, the Special Master concluded
14 that the provision of the plan of distribution that would eliminate cash payments to small claimants
15 in the event the \$50 million cap was exceeded was fair and reasonable:

16 Here, the plan of distribution provides a mechanism for paying small claimants
17 and employs a procedure for eliminating *de minimis* refunds only in the event that
18 there are more than 5 million small claimants (and the total of the minimum \$10
19 payments would therefore exceed \$50 million), an event which would require a
20 robust claims experience above the norm experienced in most similar class
21 actions. Accordingly, the Special Master finds that the provision for not making
22 cash payments below \$10 is fair and reasonable. In addition, unlike the *de*
23 *minimis* claimants in *Sullivan*, the small claimants here will receive the benefit of
24 a *cy pres* distribution in the amount of \$40 million in addition to the injunctive
25 relief and "civic" benefits discussed by the Third Circuit.

26 Report, Part I, at ¶ 279. *See also* cases cited at Report, Part I, at ¶¶ 277 – 278. The fact that
27 something extra in the form of a *cy pres* distribution is being offered in the proposed plan does not
28 make that plan unfair or unreasonable. In other words, if no direct benefit to small claimants is
acceptable, then providing them with an indirect benefit tailored to their interests by the designation
of appropriate *cy pres* recipients in compliance with Ninth Circuit authority and the California

1 Attorney General's Office Guidelines⁹ cannot be unacceptable.¹⁰ Report, Part I, at ¶¶ 290 - 292.

2
3 As noted above, in order for this contingency to be triggered, the claims experience in this
4 litigation will have to be "above the norm experienced in most similar class actions." Report, Part
5 I, at ¶ 279. Unlikely or not, the Special Master gave significant consideration to the efficacy of *cy*
6 *pres* distributions in his Report. Contrary to the objectors' view that *cy pres* distributions benefit
7 only the *cy pres* recipients, the Special Master found, based on case authority and his own
8 experience, that "distributions of *cy pres* relief using all or part of a settlement fund serves multiple
9 goals: it allows small claimants, usually consumers, to receive some relief when their individual
10 claims would simply be too small to ensure a feasible distribution; it operates to punish and deter
11 defendants who have engaged in illegal acts by preventing them from keeping ill-gotten gains
12 under the guise that direct distribution back to individuals is not feasible; and it avoids problems
13 with other forms of indirect relief." Report, Part I, at ¶ 284 (citations omitted).

14 The Ninth Circuit has never suggested that *cy pres* distributions are fundamentally
15 ineffective or disfavored as a matter of law. Rather, as the Special Master found, the Ninth Circuit
16 has "addressed the question of what kind of safeguards are necessary to ensure the fairness and
17 adequacy of a distribution plan that proposes to distribute some or (as in [*Nachshin*]) all of the
18 settlement proceeds *cy pres* for the indirect benefit of a settlement class." *Id.* at ¶ 285, 291; *see also*

19 ⁹ See, Declaration of Kathleen E. Foote, filed concurrently herewith, at ¶ 5. Ms. Foote is a Senior Assistant
20 Attorney General of the State of California.

21 ¹⁰ Objectors Shannon Cashion, W. Christopher McDonough and Kelly Kress assert that "[s]ettlements
22 involving payments to class members of under \$10 per claim are not unusual, and have been supported in
23 the past by courts." "Objection to Class Action Settlement and Attorneys' Fees," filed May 5, 2014, Dkt.
24 No. 2200, at 7 (hereinafter cited as "Cashion Objection at ____"). Although they provide no citations for
25 these assertions, there may well be a case or cases in which the decision was made to issue checks for
26 amounts less than \$10. That does not translate into the recommended plan here being unfair, unreasonable
27 or inadequate.

28 Objectors Palmer and Cook complain that the information that small claimants will not receive individual
cash payments if more than five million such claims are received was "buried within other documents" and
not featured prominently on the dramclaims.com website, and thus the notice was inadequate. Palmer
Objection at 4. This information was clearly stated in the long form notice available to all class members.
It is also discussed on the Frequently Asked Questions page and on the Calculate Claim page.

1 *e.g.*, *Nachshin v. AOL*, *supra*, 663 F.3d 1034. Further, in addition to the ability to craft a
 2 distribution that complies with Ninth Circuit authority, the Special Master found that the fact that
 3 the California Cartwright Act is the substantive law underlying at least one claim possessed by each
 4 member of the Indirect Purchaser Settlement Class adds additional support for the propriety of a
 5 possible *cy pres* remedy here. *Id.* at ¶ 289. The Special Master further discussed how California
 6 state courts, including the Supreme Court of California, and the California legislature have
 7 specifically endorsed *cy pres* distributions. *Id.* at ¶¶ 289 – 290. There is simply no basis for
 8 rejecting the Special Master’s reasoned conclusions in favor of the objectors’ unsupported views
 9 that *cy pres* distributions are universally unfair, disfavored and ineffectual as vehicles for
 10 conveying benefit to absent class members.¹¹

11 **B. The Residual Contingency *Cy Pres* Distribution**

12
 13 The other contingency that would trigger the need to formulate a *cy pres* distribution occurs
 14 if so few claims are received from small claimants that, even raising the recovery of each to the
 15 amount of the claimant’s full estimated damages, there are not sufficient claims made to pay-out a
 16 total of at least \$25 million to small claimants. In that eventuality, the difference between the total
 17 of the actual payouts to small claimants and \$25 million will be distributed *cy pres* for the benefit
 18 of small claimants. This provision was negotiated to satisfy the interests of household consumers

19 ¹¹ In their zeal to condemn *cy pres* distributions, the objectors make broad claims for holding by other
 20 circuit courts that are not supported by a reading of the cited decisions themselves. For example, nowhere in
 21 the Fifth Circuit’s decision in *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011), does
 22 the court even suggest, as objectors Hull, Campbell and Superoxygen claim, that “class representatives and
 23 class counsel breach their fiduciary duty to the class members when they provide money to third parties
 24 instead of the class.” Objection to Proposed Settlement, filed May 5, 2014, Dkt. No. 2198, at 3. Neither
 25 does the Third Circuit’s decision in *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) support
 26 the conclusion, advanced by objector Marlow, that as a matter of law, regardless of the circumstances, “[c]
 27 *pres* distributions are an inferior form of relief.” Marlow Objection at 16. Rather, it confirms that the
 28 standard of economic infeasibility articulated in *Sullivan*, *supra*, upon which the Special Master relied here,
 applies to the approval of a *cy pres* distribution; suggests that great weight should be given to the parties
 agreement (as the Special Master did here); points out that there can be many reasons for a large *cy pres*
 distribution, including that checks may simply be too small to warrant class members taking the time to file
 claims, and in all such situations, class counsel should not be penalized for suggesting an alternative method
 of getting value to those class members. *In re Baby Prods.*, 708 F.3d at 173, 178. In sum, *In re Baby Prods.*
 confirms that if proper procedures are followed, a *cy pres* distribution can be a fair, reasonable, and adequate
 alternative to a direct distribution to claimants.

1 and ensure that they will receive at least \$25 million in benefits, either in direct monetary
2 distributions or in a combination of direct distributions and indirect *cy pres* benefits.

3
4 The only objector to specifically target this provision is Robert M. Balick, who simply
5 asserts that “eligible funds . . . should be redistributed on a pro rata basis to the proper and pre-paid
6 claimants instead of non-effected [sic] third parties.” Objection, filed March 11, 2014, Dkt. No.
7 2202. However, courts have found that it can be more fair to the class as a whole to avoid such
8 windfalls by capping individual settlement recoveries based on an estimate of actual injury and
9 using the excess funds to provide an indirect benefit through a properly crafted *cy pres* distribution
10 to claimant and non-claimant class members alike. *See, e.g., Rodriguez v. West Publ. Corp.*, 2007
11 U.S. Dist. LEXIS 74767, at *40 (C.D. Cal. Sept. 10, 2007), *affirmed in part and reversed on other*
12 *grounds by Rodriguez v. West Publ'g Corp.*, 563 F.3d 948 (9th Cir. 2009) (“The Court rejects the
13 argument of certain Objectors that the possibility of a cap on individual recovery resulting in a *cy*
14 *pres* award should defeat approval of the Settlement. Those provisions do not render the Settlement
15 inadequate. The Maximum Payment was a heavily negotiated term of the Settlement. Because the
16 Net Settlement Fund is to be distributed *pro rata* among the Class Members who make a valid
17 claim, the Maximum Payment prevents a small group from receiving a multi-million dollar
18 windfall. . . . The Maximum Payment does not create any benefit for Defendants, as they will not
19 receive any money back if the Maximum Payment and *cy pres* award are implicated. In that event,
20 this Court will determine the recipient of any *cy pres* award of the undistributed funds.”); *In re*
21 *NCO Fin. Sys.*, 2002 U.S. Dist. LEXIS 17602 at *24 (E.D. Pa. 2002) (approving a settlement
22 distribution plan that provided that “[t]o the extent that claiming class members' checks are
23 returned or remain uncashed for a period of 120 days after mailing, or each claiming class member
24 receives the maximum share of \$75.00 and there still remains a portion of the net settlement fund
25 undistributed, NCO shall transmit to Lead/Liaison Counsel a check representing the remaining
26 portion of the net settlement fund for a *cy pres* distribution”); *In re Music Compact Disc Minimum*
27 *Advertised Price Litigation*, *supra*, 216 F.R.D. 197, 208-10 (district court approved a fixed

1 distribution that capped recovery at \$25 per consumer).

2
3 As the Special Master concluded after reviewing the relevant law on *cy pres*, “the proposed
4 plan of distribution here is grounded in the educated prediction that all or virtually all of the
5 settlement proceeds will be paid out *pro rata* to class members based upon the extent of damages
6 suffered, which all counsel recognize as the preferred option in damage claim class action
7 settlements. [footnote omitted.] Despite the preference for cash refunds to class members,
8 however, a viable alternative does exist in which the settlement funds are distributed, in whole or in
9 part, *cy pres* or through fluid recovery, to charitable and/or public institutions which are found by
10 the court to convey an indirect benefit on members (frequently consumers) of the settlement class.
11 *See, e.g., In re Toys-R-Us Antitrust Litig.*, 191 F.R.D. 347, 353-54 (S.D.N.Y. 2000); *In re Mexico*
12 *Money Transfer Litigation*, 164 F.Supp.2d 1002, 1010-11 (N.D. Ill. 2000), *aff’d*, 264 F.3d 743 (7th
13 Cir. 2001); *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 716 (2006); *In re Vitamins Cases*,
14 107 Cal. App. 4th 820, 826, 830-32 (2003).”

15 **V. IT IS NOT NECESSARY TO DETERMINE THE IDENTITY OF THE CONTINGENT**
16 **CY PRES RECIPIENTS IN ORDER TO GRANT FINAL APPROVAL TO THE PLAN**
17 **OF DISTRIBUTION OR THE SETTLEMENTS**

18 Finally, two of the objectors raise the question of the proper designation of *cy pres*
19 recipients under Ninth Circuit law even as three others acknowledge it is premature.¹² The
20 objectors who raise the issue, Palmer and Cook, disagree with the Special Master’s conclusion that
21 it would be difficult and wasteful to engage in the process of selecting *cy pres* recipients at this
22 time, and assert that “failing to indicate the *Cy pres* recipient [now] renders a settlement
23 ‘unacceptably vague.’ *Dennis*, 697 F.3d at 867.” Palmer Objection at 5. They make two points in
24 support of this objection.

25 ¹² Objectors Cashion, McDonough and Kress simply “request that this Court keep [the 9th Cir.] standards
26 in mind if Class Counsel seeks to establish a *cy pres*,” distribution. These objectors also request the right to
27 brief the *cy pres* issue if and when it becomes ripe. Cashion Objection at 6.

One is that a putative class member has “the right” to be given the identity of *cy pres* recipients before the opt-out date lest he remain in a class action which ultimately designates as a *cy pres* recipient an entity whose “ideological point of view he finds unacceptable.” *Ibid.* Relying on *Woodley v. Maynard*, 430 U.S. 705 (1977), a First Amendment case dealing with the right of a New Hampshire couple to be free from criminal prosecution for covering up the motto “Live Free or Die” on their license plate, objectors Palmer and Cook assert that only the designation of the recipients before the opt-out date “preserves the right of absent class members to distance themselves from causes or institutions they would rather not support.” *Id.* at 5-6. Objectors Palmer and Cook’s second point is simply that the Ninth Circuit required the identification of *cy pres* recipients before settlement approval in *Dennis v. Kellogg Co.*, 697 F.3d 858 (2012). Neither of these arguments has merit, let alone outweighs the significant impediments to and reasons for not undertaking the procedures necessary to now designate potential and contingent *cy pres* recipients, who, based on the claims experience, may well never be needed.

The question of whether it was required, necessary or prudent to designate the *cy pres* recipients who would be used in the event that either of the trigger contingencies discussed above should come to pass was considered fully by the Special Master. See, Report, Part I at ¶¶ 286 – 288. First, the Special Master considered whether the case cited by Palmer and Cook, *Dennis v. Kellogg*, *supra*, 697 F.3d 858, compelled the designation of contingent *cy pres* recipients as part of the settlement approval process. *Id.* at ¶ 286. The Special Master concluded that where, as here, the settlement consideration is cash,¹³ and the *cy pres* distribution is contingent upon inchoate events, *Kellogg* does not require the designation of *cy pres* recipients at this stage of the proceedings. This conclusion is grounded in the Ninth Circuit’s stated intention in *Kellogg* not to

¹³ Obviously, if the settlement consideration itself is the *cy pres* distribution of *product* as was the case in *Kellogg*, it is virtually impossible for the district court to determine the monetary equivalent value of the settlement without knowledge of the terms and conditions of the distribution, including the entity or entities through which the distribution is going to be made. *Dennis v. Kellogg*, *supra*, 697 F.3d at 863. Here, valuation of the *all-cash* settlement is easy. \$310,720,000 United States dollars are worth \$310,720,000 United States dollars.

1 overrule its previous holding in *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948 (9th Cir. 2009).
2 Where a *cy pres* distribution is contingent on the outcome of the claims process for a cash
3 distribution, issues regarding the identification of recipients “will not be ripe until it is determined
4 that available cash remains in th[e] fund after the claims process has concluded.” Report, Part I, at
5 ¶ 287.

6
7 The Special Master’s conclusion that it was not necessary now to designate potential
8 contingent *cy pres* recipients is buttressed by practical considerations that militate against such an
9 exercise at this time. As the Special Master noted, “Plaintiffs’ counsel argued to the Special Master
10 that the provision of the plan of distribution here to defer selection of *cy pres* recipients until it was
11 established through the claims process that a *cy pres* distribution was necessary . . . served the best
12 interests of the putative settlement class. Identification of specific *cy pres* recipients at this time,
13 they argued, would mean the expenditure of significant time and money—all of which would be
14 potentially, or indeed likely, wasted. Counsel for the State of California informed the Special
15 Master that they had consulted a nationally recognized expert in *cy pres* distributions, who was of
16 the opinion that, since it is impossible to know the extent of funds available for *cy pres* distribution
17 until claims are received, any identification process that would take place at this time was likely to
18 be so imprecise that it would have to be redone when and if the need for a *cy pres* distribution were
19 established.” *Id.* at ¶ 288. The Special Master’s conclusions are supported by the Declarations of
20 Kathleen E. Foote, a Senior Assistant Attorney General in California and Chief of the Antitrust
21 Law Section, who has developed particular expertise in *cy pres* practices and procedures, and Harry
22 M. Snyder, a lawyer with extensive experience in crafting and implementing *cy pres* distributions,
23 filed concurrently with this memorandum.

24 Ms. Foote details her experience in *cy pres* distributions, including participation in
25 generating guidelines for the selection of *cy pres* recipients adopted by the California Attorney
26 General. Foote Declaration at ¶¶ 1 – 6. Based on this experience, Ms. Foote opines “that it is
27 infeasible to determine that a particular *cy pres* distribution, even a hypothetical or contingent one,

1 will effectively serve the interests of the settlement class without knowing how much money is
2 available for distribution and when it will become available. This is because recipient non-profit
3 and governmental organizations alter their priorities and services, and increase or decrease their
4 staffing and other expenditures, from one year to the next in response to changing public needs and
5 availability of funding from multiple sources; hence, a non-profit or governmental organization
6 offering a program well-suited to meeting the nexus requirement this year may no longer do so two
7 or three years hence.” *Id.* at ¶ 7.

8
9 Based on his even more extensive experience in this area, Mr. Snyder details in his
10 Declaration the procedures for choosing *cy pres* recipients that he believes are necessary to comply
11 with the requirements of case law and fundamental fairness, and concludes that in order to
12 implement these procedures, it is necessary to know both the “approximate amount of *cy pres* funds
13 that will be available when distributed” and the “timeline for its distribution.” Snyder Declaration
14 at ¶ 8.

15 As discussed above, the possibility that the \$40 million *cy pres* distribution will be
16 occasioned by the receipt of more than five million small claims is so remote that for all practical
17 purposes it can be eliminated from the Court’s consideration. This leaves the potential *cy pres*
18 distribution under the recommended plan limited to an amount of money, as yet unknown, that
19 would remain of the \$25 million designated for the benefit of small claimants after all such
20 claimants have been compensated to the full extent of their injury. Clearly, it is not possible at this
21 time to estimate with any degree of precision the approximate date on which the *cy pres*
22 distribution would take place. The claims period does not close until August and claims processing
23 has just begun. Even if one could estimate the length of time after the claims deadline that will be
24 required for processing and auditing all of the claims received, the possibility that one or more of
25 the objectors appeal the overruling of their objection(s) to the Ninth Circuit creates another
26 impediment to knowing when a distribution will take place. Accordingly, even leaving aside the
27 expense of undertaking the process of designating *cy pres* recipients who may well never be

needed, Mr. Snyder concludes that “setting out a contingent *cy pres* distribution plan that identifies projects and recipients based on assumptions as to the size of the fund that may be available and the timeline for its distribution would violate best practices for *cy pres* grant making and distribution.”

Id. at ¶ 11.

Palmer and Cook’s other argument is that their participation in a class action in which their money might go to support a *cy pres* recipient not of their liking would violate their First Amendment rights.¹⁴ The case on which they rely, *Woodley v. Maynard, supra*, 430 U.S. 705, is not even tangentially relevant to a class action or Attorney General settlement *cy pres* distribution. The Third Circuit in *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013) (emphasis added) recently rejected a similar due process challenge:

Young contends that the settlement notice was inadequate because it did not identify the *cy pres* recipients who will receive excess settlement funds. [footnote omitted.] His primary concern is that unnamed class members will not have the opportunity to object to the selection of the *cy pres* recipients, who are intended to serve as proxies for the class members’ interests. While a valid concern, *failure to identify the cy pres recipients is not a due process violation*. Class members know there is a possibility of a *cy pres* award and that the Court will select among recipients proposed by the parties at a later date. This knowledge is adequate to allow any interested class member to keep apprised of the *cy pres* recipient selection process. We are confident the Court will ensure the parties make their proposals publicly available and will allow class members the opportunity to object before it makes a selection.

Palmer and Cook make the additional argument that without identifying *cy pres* recipients in the notice, putative class members cannot opt out if they disagree with the selection of the proposed recipients. However, the controlling law in this area is the Ninth Circuit’s holding in

¹⁴ It should be noted that if the claims received by all small claimants are too few (which as a practical matter is the only contingency in the proposed plan that might in fact be triggered), there will be no First Amendment problem insofar as these objectors are concerned because they will still receive a check, e.g., their own monies will not be distributed *cy pres*. Even if the extremely unlikely were to occur and too many claims are received such that the other *cy pres* contingency were to be triggered, there still may not be a First Amendment problem insofar as these objectors are concerned if their own claims are large enough that their raw pro rata share of the fund is \$10 or more. In the event that the claims of the objectors are large enough, they will still receive a check such that the monies they would otherwise receive will not be distributed *cy pres*.

1 *Rodriguez v. West Publ'g Corp.*, *supra*, 563 F.3d at 966, that where the possibility of a *cy pres*
 2 distribution is contingent, a challenge to the *cy pres* implementation is not “ripe” for adjudication.
 3 Given that the contingencies involved are highly inchoate and uncertain, that challenge by objectors
 4 as third parties cannot be saved from lacking ripeness, and thus exceeding the Article III subject
 5 matter jurisdiction of the federal court, merely because they claim that the First Amendment is
 6 involved. *See, e.g., Kowalski v. Tesmer*, 543 U.S. 125, 131-34 (2004); *Warth v. Seldin*, 422 U.S.
 7 490, 516 (1997).

8
 9 Moreover, the objectors cite no case in which a *cy pres* remedy was viewed as some sort of
 10 compelled financing of speech by absent class members. As long as funds are disbursed in
 11 accordance with non-discriminatory and non-political procedural guidelines that ensure a broad
 12 dissemination of grants from the *cy pres* fund, a First Amendment challenge should fail as a matter
 13 of substance. This is especially true given that, by definition, this Court, Class Counsel and the
 14 Attorneys General all act in a fiduciary capacity on behalf of those absent class members in the
 15 selection process. Finally, if after the identity of the selected *cy pres* recipient(s) is published on
 16 appropriate websites, should a small claimant class member object to a recipient, this Court has the
 17 discretion to allow any such objector to opt-out of the Indirect Purchaser Settlement Class. This
 18 would certainly prevent any claimed First Amendment rights from being violated.¹⁵

19 VI. CONCLUSION

20 The plan of distribution for the Indirect Purchaser Settlement Class was negotiated under
 21 the auspices of the Special Master and then reviewed by him for compliance with the applicable
 22 legal principles. Following this review, the Special Master issued a comprehensive Report and
 23

24 ¹⁵ *Cf., e.g., Knox v. Service Employees Intern. Union, Local 1000*, 132 S. Ct. 2277, 2291 (2012) (noting
 25 that the facts of that case went beyond the facts of previous cases authorizing a union to undertake a general
 26 yearly assessment of fees even if some of their fees are to be used for political purposes so as long as union
 27 members could opt-out of authorizing that their fees be used for those purposes); *accord Davenport v.*
 28 *Washington Ed. Assn.*, 551 U.S. 177, 181, 185 (2007); *Aboud v. Detroit Bd. of Ed.*, 431 U.S. 209, 238
 (1977).

Recommendations dealing with, *inter alia*, the provisions of the plan of distribution and the claims processing protocols developed to implement it. Report, Part I, at ¶¶ 201 - 292, and Report, Part II, at ¶¶ 32 - 38, 49 - 51. The objections that were raised to certain specific aspects of plan present no basis for this Court to reject the recommended plan. Accordingly, Indirect Purchaser Plaintiffs' Co-Lead Counsel and the Attorneys General respectfully request this Court to: (1) grant final approval to the plan of distribution for the Indirect Purchaser Settlement Class, as well as final approval to the plans of distribution for the Government Purchaser Settlement Classes (to which no objection has been interposed); (2) grant final approval to the claims processing protocols for the Indirect Purchaser Settlement Class, (to which no objection has been interposed); and (3) confirm its adoption of the Special Master's findings of fact and conclusions of law as to the plans of distribution and claims processing protocols.

Dated: June 6, 2013

COOPER & KIRKHAM, P.C.

By: /s/ Tracy R. Kirkham
Tracy R. Kirkham

Josef D. Cooper (53015)
Tracy R. Kirkham (69913)
COOPER & KIRKHAM, P.C.
357 Tehama Street, Second Floor
San Francisco, CA 94103
Telephone: (415) 788-3030
Facsimile: (415) 882-7040
trk@coopkirk.com

Timothy D. Battin
Christopher V. Le
STRAUS & BOIES, LLP
4041 University Drive
Fifth Floor
Fairfax, VA 22030
Telephone: (703) 764-8700
Facsimile: (703) 764-8704
tbattin@strauss-boies.com

Daniel J. Mogin (95624)
THE MOGIN LAW FIRM, P.C.
707 Broadway
Suite 1000
San Diego, California 92101
Telephone: (619) 687-6611

Facsimile: (619) 687-6610
dan@moginlaw.com

Daniel E. Gustafson
Daniel C. Hedlund
GUSTAFSON GLUEK PLLC
Canadian Pacific Plaza
120 South Sixth Street, Suite 2600
Minneapolis, MN 55402
Telephone: (612) 333-8844
Facsimile: (612) 339-6622
dgustafson@gustafsongluek.com

Co-Lead Class Counsel for Indirect-Purchaser Plaintiffs

Francis O. Scarpulla (41059)
ZELLE, HOFMANN, VOELBEL, MASON &
GETTE LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
Telephone: (415) 693-0700
Facsimile: (415) 693-0770
fscarpulla@zelle.com

Liaison Counsel, Indirect Purchaser Plaintiffs

Terry Gross (103878)
GROSS BELSKY ALONSO LLP
One Sansome Street, Suite 3670
San Francisco, California 94104
Telephone: (415) 544-0200
Facsimile: (415) 544-0201
terry@gba-law.com

Chair, Indirect Purchaser Plaintiffs' Executive Committee

Dated: June 6, 2013

KAMALA D. HARRIS
Attorney General of California

By: /s/ Emilio E. Varanini
Emilio E. Varanini

Kathleen Foote
Emilio E. Varanini
Deputy Attorney General
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664

Attorneys for the State of California as Liaison Counsel On Behalf of All Attorneys General

ATTESTATION

Pursuant to Civil L.R. 5-1(i)(3), I hereby attest that I have obtained concurrence in the service and filing of this document with electronic signatures from all counsel of the parties listed above.

Dated: June 6, 2013

/s/ Tracy R. Kirkham

Tracy R. Kirkham